In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 131

AGNES TOOMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1961. The petition for a writ of certiorari was filed on June 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a prosecution for conspiracy the trial court erred in admitting testimony about a telephone call made by a co-conspirator, in the presence of the witness, to a person circumstantially shown to have been the petitioner.

STATEMENT

Petitioner and two others were convicted in the Western District of Pennsylvania of conspiring to transport a woman in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2422. Petitioner was sentenced to five years' imprisonment and a fine of $1,000.

The petitioner, Agnes Toomer, operated a well known house of prostitution in Wheeling, West Virginia, known as the 26th Street Hotel (Pet. 4). At the inducement of co-conspirators Frank and Stead, one Patricia Ann Kister agreed to enter into prostitution if a suitable location could be found in Pennsylvania, Ohio or West Virginia (*ibid.*). Miss Kister testified that in March 1959, Stead, at whose apartment in Pittsburgh she was then staying, placed a person-to-person telephone call to "Agnes at the 26th Street Hotel" in Wheeling (R. 26a-27a).[1] Stead described Miss Kister, asked if Agnes "had a room for a girl" and if Miss Kister "could come down," and stated that she "would be down" (R. 27a-28a). The next day Frank took Miss Kister to a bus sta-

[1] "R" refers to appellant's appendix in the court of appeals and "Tr." to the trial transcript. We have lodged the latter with the Clerk.

tion, bought her a ticket for Wheeling, and gave her a piece of paper on which was written "Agnes' Hotel * * * Agnes' name, 26th Street Hotel and the address and the name I was supposed to use" and the telephone number there (Pet. 4; Tr. 14-15, 104). Upon arriving in Wheeling, Miss Kister went to the petitioner's 26th Street Hotel and worked as a prostitute there for five or six days, eventually turning over her earnings to Frank and Stead (Pet. 4).

ARGUMENT

Petitioner contends that it was improper to admit against her Miss Kister's testimony as to the telephone call Stead made to "Agnes" at the 26th Street Hotel. Petitioner invokes the hearsay rule that declarations of a conspirator are not admissible against one not present unless there is proof *aliunde* that such absent person was a member of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60. The rule is inapplicable here, however, because Miss Kister's testimony as to the placing of the telephone call and Stead's statements during the conversation was not hearsay. The evidence was introduced not to prove the truth of what Stead said, but to prove that he had made the telephone call to "Agnes" at the 26th Street Hotel, and had arranged for Miss Kister to work there as a prostitute. Miss Kister was present during the entire call, and her testimony about it was direct evidence.

The only remaining link necessary to establish petitioner's participation in the conspiracy was to

show that the person to whom Stead spoke when he called "Agnes" was the petitioner Agnes Toomer. There was ample evidence which justified the jury in concluding that Stead had spoken to the petitioner when he made arrangements for Miss Kister to work as a prostitute at the 26th Street Hotel. Stead placed a person-to-person call to the petitioner; Miss Kister was put on a bus for Wheeling, West Virginia, and given a note with the name "Agnes" and the petitioner's hotel address on it; and petitioner was expecting Miss Kister and provided accommodations for her to engage in prostitution. The identity of the person with whom the conversation was had may be established by circumstantial evidence. *Cwach* v. *United States*, 212 F. 2d 520 (C.A. 8); *United States* v. *Bucur*, 194 F. 2d 297, 303-304 (C.A. 7); *Andrews* v. *United States*, 78 F. 2d 274 (C.A. 10).

In any event, if Miss Kister's testimony about the telephone conversation is viewed as hearsay, the additional evidence described in the preceding paragraph was sufficient proof *aliunde* that petitioner was a member of the conspiracy to justify admission of the testimony against her.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1961.

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